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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

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No. 709 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF
LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND
TRUST COMPANY AND STATE BANK COMMISSIONER
OF LOUISIANA, *Respondents*

No. 708 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF
LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND
TRUST COMPANY AND STATE BANK COMMISSIONER
OF LOUISIANA, *Respondents*

**BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI
FOR RESPONDENTS, BANK OF NEW ORLEANS AND
TRUST COMPANY, BANK OF LOUISIANA IN
NEW ORLEANS AND GUARANTY BANK AND
TRUST COMPANY**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 763

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF
LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND
TRUST COMPANY AND STATE BANK COMMISSIONER
OF LOUISIANA, *Respondents*

No. 798

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF
LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND
TRUST COMPANY AND STATE BANK COMMISSIONER
OF LOUISIANA, *Respondents*

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI
FOR RESPONDENTS, BANK OF NEW ORLEANS AND
TRUST COMPANY, BANK OF LOUISIANA IN
NEW ORLEANS AND GUARANTY BANK AND
TRUST COMPANY

This brief is submitted on behalf of respondents
Bank of New Orleans and Trust Company, Bank of
Louisiana in New Orleans and Guaranty Bank and

Trust Company, Lafayette, Louisiana, in opposition to the petitions for a writ of certiorari filed on behalf of Whitney National Bank in Jefferson Parish and James J. Saxon, Comptroller of the Currency.

QUESTIONS PRESENTED

1. Should not the Court deny certiorari in this case wherein the Court of Appeals, after a carefully reasoned opinion, enjoined the Comptroller of the Currency from licensing, under 12 U.S.C. § 27, a banking operation *admittedly, concededly and purposefully* devised and proposed by Whitney National Bank of New Orleans, the largest bank by far in the State of Louisiana, *solely* as a means of circumventing and evading the lawful prohibitions of the National Bank Act (12 U.S.C. § 36) and Louisiana Revised Statutes 6:§§ 54 and 328?

2. Should not the Court deny certiorari in this case wherein the District Court, affirmed by the Court of Appeals, enjoined the Comptroller of the Currency from licensing, under 12 U.S.C. § 27, the opening of the proposed banking operation on the further ground that same is directly and expressly prohibited by the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.R.S. 6:1001-1006 (1962 Supp.), enacted by Louisiana pursuant to the power specifically reserved to the States by the Federal Bank Holding Company Act, 12 U.S.C. § 1846?

3. Should not the Court deny certiorari in this case wherein one petitioner (not supported by the other) belatedly contends *for the first time after judgment of the Court of Appeals*, that this is not a summary judgment case in the face of a record (a) wherein *all parties, including the now complaining petitioner, moved*

for summary judgment on the basis of a carefully designated and documented record of undisputed facts, later relied on by the District Court and the Court of Appeals in their decisions, and (b) wherein counsel for the now complaining petitioner, at the specific request of the District Court and as a *condition precedent* for making his oral argument in support of his motion for summary judgment, certified on the record that "there are **no** facts . . . which are in dispute"?

4. Should not the Court deny certiorari in this case wherein petitioners spuriously contend that this action somehow represents an attack on a Federal Reserve Board decision, while both petitions simultaneously admit that the Comptroller of the Currency *alone* (not the Board) has the authority under the National Bank Act (12 U.S.C. § 27) to attempt to charter the proposed unlawful banking operation, and that the "sole remaining . . . step necessary to permit the opening of Whitney-Jefferson . . . was the issuance by the Comptroller, under 12 U.S.C. § 27, of a certificate authorizing it to commence the business of banking"?!

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This case was decided by the District Court, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the basis of cross-motions *by all parties* for summary judgment. The Comptroller of the Currency, represented by the United States Attorney for the District of Columbia, the Department of Justice and his own General Counsel, was the first party to move for summary judgment (J.A. 222). Respondents therupon cross-moved for the same relief.

¹ See Whitney's petition, pp. 6, 7; Comptroller's petition, pp. 5, 7, 8.

(J.A. 274). Petitioner, Whitney National Bank in Jefferson Parish, thereupon also moved for summary judgment (J.A. 317). All parties filed written statements, as required by Local Civil Rule 9(h) of the District Court in summary judgment proceedings, specifying the facts upon which there was no genuine issue and which supported the motions for summary judgment (J.A. 223, 275, 318). When these motions came on to be heard, District Judge McLaughlin declined to hear argument until it was "fully agreed by all that the question to be presented to the Court is strictly a question of law" (J.A. 431). Counsel for petitioner Whitney, Mr. Dean Acheson, thereupon certified to the Court (J.A. 431,432):²

"Mr. Acheson: Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs . . . *There are no facts as such which are in dispute.* This is my assertion to your Honor." (Italics supplied).

The said *undisputed facts* upon which respondents relied in their Complaint (J.A. 6-20), in support of their motions for temporary restraining order and preliminary injunction (J.A. 20, 21; 174-191; 221, 225-273), in support of their cross-motion for summary judgment (J.A. 275-293), and during *all* of the proceedings before the Court of Appeals for the District of Columbia Circuit (*and as drawn almost exclusively from papers filed by petitioners themselves in this action*) are as follows:

The Whitney National Bank of New Orleans is the largest bank by far in the State of Louisiana (Comp.

² As stated, no issue was raised on this subject until after the Court of Appeals rendered its judgment.

Ex. 5, J.A. 99). It is one of the largest financial institutions in the entire southern portion of the United States (J.A. 99, 275). For approximately 80 years, Whitney has operated its banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, Louisiana (the City and Parish being co-terminous). Through these operations, *admittedly and concededly still properly and constitutionally restricted by a long-standing combination of Federal and Louisiana statutory law to the limits of Orleans Parish*, Whitney has grown to a position of banking dominance where it possesses (J.A. 275) —³ approximately \$500,000,000—in resources

- " 13,835,000—in undivided profits
- " \$ 27,200,000—in its surplus account
- " 39% —of the total deposits in all banks in Orleans Parish
- " 44% —of all deposits of individuals, partnerships and corporations in the Parish.

Contrary to the impression sought to be conveyed by petitioners, Whitney National Bank today, as in the past, continues to maintain this position of dominance. It controls and possesses more deposit and loan business than the second and third largest banks in New Orleans combined (J.A. 275). It also

³ In this connection, it is interesting to note by way of comparison, that the bank merger enjoined by this Court in *U. S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), was deemed violative of the Clayton Act because: *after the merger, the resulting bank would control "at least 30% of the commercial banking business in the ... Philadelphia metropolitan area"*. This Court stated, at page 364: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." (Italics supplied). Here, Whitney controls approximately 40% or more.

possesses at its offices in New Orleans deposits of individuals, partnerships and corporations emanating from the East bank of the Mississippi River in *Jefferson Parish* (i.e. beyond the limits of Orleans Parish) in an aggregate amount exceeding 33 $\frac{1}{3}$ % of such deposits enjoyed by *all banks* having their head offices in the same area of Jefferson Parish (J.A. 276). In the record before this Court, Governor Robertson of the Federal Reserve Board formally describes the concentration of banking resources possessed by Whitney National Bank as (J.A. 111)—

"... a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system."

As stated above, both petitioners (the Comptroller of the Currency and Whitney National Bank in Jefferson Parish) have consistently and openly conceded before the Courts that Whitney National Bank of New Orleans remains today, as it has been for many years past, *constitutionally and lawfully prohibited by a combination of Federal and Louisiana law* from opening banking offices beyond the limits of New Orleans. This concession is found again at page 4 of Whitney's instant petition to this Court, as follows:

"Both Whitney-New Orleans and all other New Orleans national banks are prevented by 12 U.S.C. § 36(e) from establishing branches outside Orleans Parish. That section provides that national banks may establish branches only within the geographical limits imposed by state law on state banks. Louisiana state banks in New Orleans with assets of \$100,000, or more are prohibited from establishing branches outside Orleans Parish by Louisiana Revised Statutes 6:54 and 328."

Substantially the same admission appears at page 3 of the Solicitor General's petition, where he states on behalf of the Comptroller:

"However, State law *(La. R.S. 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36)." *

In spite of its clear recognition and understanding of these statutory prohibitions, Whitney-New Orleans nevertheless proceeded to spend several years studying various "devices" for the circumvention and evasion of same. It carefully considered and categorically rejected the possibility of an "*affiliate arrangement*", such as was involved in *Camden Trust Company v. Gidney, Comptroller of the Currency*, 112 U.S. App. D.C. 197, 301 F. 2d 521, cert. denied, 369 U.S. 886 (1962). With regard to Whitney's rejection of a Camden-type "*affiliate arrangement*", the President of Whitney-New Orleans, in formal testimony before the Federal Reserve Board, put it this way (Comp. Ex. 4, J.A. 74):

"If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. . . . But that is not possible. We see no signs of it coming about by legislative action . . . and our

* In *United States v. Philadelphia National Bank*, *supra*, this Court recognized the validity and substance of these branching prohibitions, by stating, at page 325: ". . . but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far."

problem has been—we have been unwilling to go with an affiliate which we couldn't hold onto necessarily.

"It (an affiliate) doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward."

"The thing that makes this (the holding company approach) interesting to us is the ability to approach the branch phase of it . . ." (Italiës supplied).

As indicated by that testimony, Whitney-New Orleans finally decided to try a "holding company approach", admittedly as a means of circumventing the Federal and State statutory prohibitions. In this particular connection, the President of Whitney-New Orleans also testified (Comp. Ex. 4, J.A. 64, 65):

"Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans."

"There is a rapidly growing industrial area in adjoining Jefferson Parish up river from Orleans,

"The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish . . . and to participate in the further growth of that area. . . ."

*"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company *and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.*"* (Italiës supplied).

A very surprising and unusual aspect of the case in the Courts below was the open, sworn admission by the Comptroller of the Currency that his office and top officials therein (*including the Comptroller himself*) had actually met with the President of Whitney-New Orleans for the purpose of furnishing *advance* private advice and guidance from the very outset as to how the Federal and State branching statutes might be circumvented and evaded (J.A. 42, 43). The Comptroller, in a sworn affidavit, stated (J.A. 42, 43):

"... the Whitney National wished to explore with the Comptroller whatever . . . means were available for . . . expansion into this growing area . . . The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney-New Orleans; but which, in view of the wide stock distribution of Whitney-New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney Management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management . . . elected to use a holding company for the purpose of establishing a . . . bank in Jefferson Parish.

"At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered . . ." (Italics supplied).

Having obtained such a favorable *ex parte* nod from the Comptroller of the Currency before even initiating Whitney's plan for evasion of the Federal and State branching prohibitions, the President of Whitney-New Orleans was thus able repetitiously to represent when he later appeared for testimony before the Federal Reserve Board (Comp. Ex. 4; J.A. 65, 66):

"The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, . . . and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the holding company. . . ."

"The Comptroller has already concurred in the acts required to consummate the first step and granted preliminary approval of an application for charter for the Whitney National Bank in Jefferson Parish. . . ."

"We understand that he has advised you that these charters will be issued if and when the Federal Reserve Board approves this application for a holding company. . . ." (Italics supplied).

This private advance approval by the Comptroller also caused the Whitney National Bank of New Orleans to set into motion a series of intricate corporate maneuvers, the *sole purpose* being to accomplish indirectly and by evasion that which was admittedly unlawful for Whitney to accomplish directly, i.e., its

expansion into Jefferson Parish (J.A. 278, 279). Although complicated in execution, these corporate maneuvers were simply designed to draw funds from the Whitney National Bank of New Orleans, with which to establish totally controlled banking offices and facilities in Jefferson Parish and later elsewhere in Louisiana:

- First:* With \$350,000. of its capital funds, Whitney National Bank of New Orleans created Whitney Holding Corporation, *a corporation organized under the laws of Louisiana.*
- Second:* Solely with the \$350,000. contributed by Whitney-New Orleans, Whitney Holding Corporation organized a so-called "phantom bank" named Crescent City National Bank, (Crescent), to which the Comptroller of the Currency agreed to issue a national bank charter, *knowing full well that Crescent would exist in name only, and would never engage in the banking business.*⁵

⁵ A Federal Officer's issuance of a national bank charter to a non-existent bank, knowing well it was never intended to be opened and operated as a national bank and that its sole purpose was to eliminate dissenting stockholders of Whitney National Bank of New Orleans who did not want to participate in the evasion of federal and state laws (there were 12,145 dissenting shares out of approximately 100,000 voting on the matter), was perhaps the second most bizarre aspect of the case below. This maneuver caused a member of the Federal Reserve Board to state (J.A. 110): "In order to eliminate minority stockholders of Whitney National Bank of New Orleans and thereby to insure that Whitney Holding Corporation will be able to elect all members of the bank's board of directors, the plan before the Board includes a so-called 'phantom bank' merger, which makes it impossible for a [dissenting] stockholder to retain his stock interest therein. The purpose of centralizing control of the holding company and its banks in the hands of very few individuals-- perhaps only one individual-- is apparent from other features of the proposal."

Third: Whitney-New Orleans and Crescent, which latter entity never actually operated for an instant as a national bank (and Whitney Holding Corporation), entered into a consolidation or merger agreement, merging Whitney-New Orleans into the "phantom", Crescent. The name of the merged bank was then immediately changed back to Whitney National Bank of New Orleans.

Fourth: Whitney National Bank of New Orleans shareholders surrendered their stock for cancellation, and accepted in exchange Whitney Holding Corporation shares, dissenting stockholders, if any, being eliminated by the purchase of their shares under provisions of the National Bank Act (12 U.S.C. § 215(b), (c)).⁶ Thus, Whitney Holding Corporation thereupon owned 100% of the stock of Whitney National Bank of New Orleans, and the surviving stockholders of Whitney National Bank of New Orleans owned 100% of the stock of Whitney Holding Corporation.

Fifth: Whitney National Bank of New Orleans then provided \$650,000. of its capital funds to Whitney Holding Corporation "with which Whitney Holding Corporation [was to] cause to be created Whitney National Bank in Jefferson Parish, receiving all [of its, the Jefferson Bank's] stock therefor." (Comp. Ex. 6, J.S. 112-114).⁷

⁶ 12,145 shares out of about 100,000 actually voted against the entire device. In fact, dissenting stockholders of Whitney-New Orleans even appeared before the Federal Reserve Board and vehemently protested against federal recognition of this illegal circumvention of the statutes (J.A. 83-88).

⁷ In order to enable the Court more quickly to obtain a simple analysis of these corporate exercises promoted and put into effect by Whitney-New Orleans, respondents respectfully direct the Court's attention to the series of charts which appear in the Joint Appendix (J.A. 281-284) diagramming each of these corporate activities.

The President of Whitney-New Orleans candidly and succinctly summarized the end result of these corporate maneuvers for the Federal Reserve Board as follows (Comp. Ex. 4, J.A. 68):

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of \$650,000. in capital funds which will be put into the Jefferson Parish unit as capital for it."

Upon the further *ex parte* recommendation of the Comptroller of the Currency (and before Whitney-New Orleans appeared before the Federal Reserve Board in support of its holding company proposals), Whitney-New Orleans called a meeting of its stockholders and apprised them of its plans to enter Jefferson Parish and the reasons for it (Comp. Ex. 4, J.A. 66). In the notice which announced this meeting, the President of Whitney-New Orleans advised his shareholders as follows (J.A. 31, 21):

"We are enclosing a letter in accordance with the requirements of the United States Comptroller of the Currency which outlines in detail the proposed program. It is important to bear in mind that under the plan *all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock.* You will then own the same proportionate interest as you now have in the Whitney National Bank in all the assets of the holding corporation, which obviously includes all of the assets of the present Whitney National Bank. Control of the Holding Corporation management will rest . . . with the holders of a majority of the stock. . . .

"We are firmly convinced, after careful consideration of the alternatives, that your common owner-

ship of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of *pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community.* From the depositors' point of view, those in the smaller bank will be assured of *the same management* which directs the larger one without possibility of interruption. *They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management.* . . .

"Under the *holding company approach*, the relationship is *completely owned by the stockholders of the holding company*, who will be *all* the present stockholders of the Whitney National Bank and their successors.

"By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between *affiliated banks*.⁸ There will be no minority stockholders to be affected.

"From the customer point of view, there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business *between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.*

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. . . .

⁸ The Court's attention is directed again to the repeated rejections by Whitney-New Orleans, on the ground of alleged "conflict of interest" possibilities, of an "affiliate arrangement", such as the one involved in *Camden Trust Company v. Gidney, supra*.

"Finally, this holding company group broadens banking possibilities for the future from the point of view of our shareholders. . . . It will give metropolitan New Orleans the soundest form of banking unit *which can accumulate and pool banking resources in this community where they can be used to greatest advantage in the further development of the entire area.* (Italics supplied).

As indicated before, after its creation by Whitney National Bank of New Orleans, Whitney Holding Corporation made application to the Federal Reserve Board *solely* for the purpose of gaining the Board's approval, under the provisions of 12 U.S.C. § 1842 (The Federal Bank Holding Company Act of 1956), of the Holding Corporation's proposed acquisition of all of the shares of the aforementioned Crescent City corporation and Whitney National Bank in Jefferson Parish. In accordance with the requirements of 12 U.S.C. § 1842 (b), the Board notified the Comptroller of the Currency of the application and sought his views (J.A. 286). Having already given his *ex parte* approval to the plan before it was put into execution, the Comptroller, in three short paragraphs of a letter to the Board, gave his full written approval of the Whitney proposal (J.A. 166, 167; 286). The Comptroller failed even to mention or comment upon the legality or illegality of the proposals under 12 U.S.C. § 36 (e), and La. R.S. 6:54 (J.A. 166, 167).⁹

⁹ In fact, the Comptroller apparently led counsel for Whitney-New Orleans to feel it was proper for him orally to represent before the Board that the Comptroller wanted to be assured Whitney would be allowed to go forward "with the meat of the program, which was moving into Jefferson Parish"; and that the Comptroller felt this was "a desirable banking feature" (Comp. Ex. 4, J.A. 93, 94).

This favorable action by the Comptroller made it unnecessary for the Federal Reserve Board to hold any statutory public hearing in Louisiana on the application under the provisions of 12 U.S.C. § 1842 (*Northwest Bank Corporation v. Federal Reserve Board*, 303 F. 2d 832 [CCA 8, 1962]). However, when the Board did accept a presentation of views on the application at its headquarters in Washington and when dissenting stockholders of Whitney-New Orleans appeared and vehemently protested the illegality of the entire proposal under Federal and State law, the Board, on its own motion, again wrote to the Comptroller of the Currency advising him that charges had been made that the proposals "were in violation or circumvention of existing law" (J.W. 423-425). The Board then stated to the Comptroller (J.A. 424):

In view of the bearing that these matters might have on the Board's decision on Whitney Holding Corporation's application, the Board would appreciate any comments that you may have . . ."

The Comptroller, however, refused to comment on any of these matters (J.A. 425, 426). Instead, he replied as follows (J.A. 426):

"Other comments with respect to the legality and merits of the holding company are matters on which a previous Comptroller of the Currency has expressed himself; therefore, further enlargement on the subject is deemed undesirable." (Italics supplied).

But, the record is barren of any expressions by any Comptroller of the Currency, past or present, regarding the lawfulness of "the holding company approach" under the applicable Federal and State statutes (see

J.A. 166). The fatal effect of the Comptroller's strange refusal to supply such information or comments to the Federal Reserve Board is patent when it is fully understood that the Board declines even to consider or rule on such matters itself, absent advice from the Comptroller (J.A. 168, 286, 287). The Board took the position in this very case that all matters "*relating largely to an alleged violation of provisions of the National Bank Act*" are for the Comptroller, not the Board (J.A. 168, 286, 287).

Thus, when the Board rendered a decision on May 3, 1962 approving the application of Whitney Holding Corporation to proceed to acquire the shares in Crescent and Whitney Jefferson, it did so without even referring to 12 U.S.C. § 36 (e), 12 U.S.C. § 1846 or the Louisiana law prohibiting branching by national and state banks beyond parish lines, or the effect these statutes might have had upon its decision (J.A. 287). In fact, having received an unqualified green light from Comptroller Saxon, the Board candidly admitted it was authorizing Whitney-New Orleans, through a holding company device, to evade the prohibitions otherwise imposed upon it by the laws (J.A. 99, 100). The Board accordingly ruled (J.A. 99, 100, 101):

"Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. . . . The boundaries of Orleans Parish are conterminous (sic) with the boundaries of the City of New Orleans, and consequently banks situated in New Orleans (including national banks) may not establish branches beyond the city limits. . . .

" . . . In accordance with the requirement of section 3(b) of the Act, the Comptroller of the Currency was asked to submit his views and recom-

mendations with respect to the pending application. In a letter dated October 11, 1961, Comptroller . . . recommended approval.

"The stated purpose of the proposed holding company system is to enable an organization centered about Whitney-New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney-New Orleans; in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank. Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney-New Orleans."

"The financial history of Whitney-New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, which depend principally upon the prospects of Whitney-New Orleans, are favorable." (Italics supplied).

This bald endorsement by the federal government under these circumstances of a device admittedly designed flagrantly to circumvent and violate both Federal and State law was a bit too much for Governor Robertson of the Federal Reserve Board. In a dissenting opinion, he stated (Comp. Ex. 5, J.A., 109-111):

"Whitney National Bank of New Orleans is the largest banking institution of the City of New

Orleans and the State of Louisiana. It controls in the neighborhood of 40% of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. *The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of . . . the City of New Orleans. In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans.*

"In my judgment, one of the basic purposes of the Bank Holding Company Act—to prevent undue concentration of banking power in holding companies—would be unjustifiably defeated by approval of the creation of a holding company system to control the predominant bank of a major metropolitan area and additional banks within that area. . . .

". . . In this case, . . . banking offices affiliated with the largest financial institution in the area would be competing with small local banks, including a bank that opened for business only two months ago in the same shopping center in which it is proposed to locate one of the offices of Whitney-Jefferson. The effect of the entry of Whitney-Jefferson at this time could be significantly detrimental to this new bank and to another small bank with which Whitney-Jefferson would directly compete. . . ."

Governor Robertson then went on to conclude (J.A. 111):

"In brief, the plan before the Board seems designed to minimize the participation of stockholders, and even of directors, in the control and

management of the holding company and its subsidiary banks. *This appears to be the common objective of (1) eliminating minority interests in subsidiary banks, . . . (2) the absence of cumulative voting in the bank holding company, (3) the provision for a board of directors that may consist of only three members, and (4) the almost unprecedented provision for use of proxies at directors' meetings.* Taken together, these features of the proposal *reflect an arrangement by which power to direct and control the holding company system, including its banks, could be concentrated in the hands of a single individual.* In my judgment, such an undemocratic arrangement is particularly inappropriate in a system that is to consist of national banks, *when it is considered that none of the three latter features is permissible under the National Bank Act and related Federal statutes.* It should not receive this Board's stamp of approval.

"The proposal before the Board would . . . provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest and therefore should be denied." (Italics supplied).

In the face of this decision by the Federal Reserve Board, the State Bank Commissioner of Louisiana immediately sought an opinion from the Attorney General of Louisiana as to whether Whitney's holding company device was lawful (J.A. 161). The Attorney General issued the following written opinion, in substance (J.A. 163, 164):

.... There is a general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose. To allow the establishment of a bank holding company to avoid and circumvent the branch banking laws of our State is, in our opinion, prohibited, if not by the letter, by the spirit of our law....

"It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

The Louisiana State Bank Commissioner thereupon sent a copy of this opinion by the Attorney General to the Federal Reserve Board (J.A. 165). He requested a rehearing (J.A. 165). Other of the respondents herein also petitioned for reconsideration (J.A. 167). The Board refused to reconsider the matter, stating that the questions raised "relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency" (J.A. 168).

Said ruling by the Board was subject to judicial review, upon the filing of a petition in the Fifth Circuit Court of Appeals *within 60 days after May 3, 1962* (12 U.S.C. § 1848; J.A. 288). Upon such review, the Court has jurisdiction under 12 U.S.C. § 1848—

"to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the Court deems proper."

However, before any petition for review could be prepared and filed and before the action of the Federal

Reserve Board could become final under 12 U.S.C. § 1848, or under the Regulations of the Federal Reserve Board itself, the Comptroller of the Currency, on May 18, 1962 (*just 15 days after the Federal Reserve Board acted*) announced gratuitously that he had already approved Whitney's program and had directed that same proceed to completion "on or after May 24, 1962" (*just 21 days after the Federal Reserve Board acted*) (J.A. 34). By June 20, 1962 (*also before the 60-day appeal period prescribed by 12 U.S.C. § 1848 had expired*) Comptroller Saxon was further announcing that absent the granting of an injunction by the Distiret Court in the case below, he would consider it his "duty . . . to issue a Certificate of Authority to Whitney-Jefferson" forthwith (J.A. 47, 289).

Accordingly, the Complaint for Declaratory Judgment and Injunction herein was filed on June 9, 1962 (J.A. 6). The action was grounded on 12 U.S.C. §§ 27, 36, 1841 and 1846, and prayed for an injunction enjoining the Comptroller of the Currency from issuing a certificate under 12 U.S.C. § 27 licensing the commencement of Whitney's unlawful banking operations in Jefferson Parish, Louisiana. The Comptroller, upon being advised of the filing, voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney-Jefferson until the Motion for Preliminary Injunction herein could be heard and determined (J.A. 289). Two of the respondents herein also timely filed in the Fifth Circuit a petition to review the ruling of the Federal Reserve Board which approved the holding company application under 12 U.S.C. § 1842 (b) (*Bank of New Orleans and Trust Com-*

pany et al. v. Board of Governors of the Federal Reserve System, No. 19,788, C.C.A. 5.)¹⁰

In the meantime, and without any fault of respondents contributing thereto, petitioner Saxon suddenly refused to continue voluntarily to withhold the issuance of his Certificate (J.A. 174, 175; 178-182). The parties accordingly appeared before the District Court, and after a hearing, Judge Hart granted a Temporary Restraining Order directing the Comptroller to withhold his Certificate until the motion for preliminary injunction could be heard (J.A. 176, 177).

The Motion for Preliminary Injunction came on to be heard on July 6, 1962 before Judge Holtzoff (J.A. 225-273). During these proceedings, the Department of Justice attorney representing the Comptroller readily stated "there can be no real question" about the fact "that the Whitney-Jefferson operation is a means used for the Whitney Bank in New Orleans to pursue banking business in Jefferson Parish" (J.A. 257). The following colloquy thereupon ensued between the Court and counsel for the Comptroller (J.A. 260):

¹⁰ On October 7, 1963, after receiving extensive briefs and hearing oral argument by all parties, including the Government and Whitney Holding Corporation, the Fifth Circuit entered the following Order:

"In view of the decision of the Court of Appeals of the District of Columbia in *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, Nos. 17,672 and 17,681, August 14, 1963, decision in the present case will be withheld pending determination in the District of Columbia of the application for rehearing and any subsequent proceedings involving application for a writ of certiorari."

On December 11, 1963, the Fifth Circuit denied Whitney's motion to vacate that ruling.

"The Court: But isn't this true, Mr. Seaman, that if this device is legal . . . , then you might as well repeal Section 36 (e) ?

"Mr. Seaman: No, . . . Your Honor, . . . 36 (e) applies only to branches.

"The Court: I understand. But it would become a dead letter because any bank that wanted to establish a branch would create a holding company as an intermediary?

"Mr. Seaman: Yes, Your Honor."

The Court was also advised by counsel for petitioner Whitney during argument on the preliminary injunction that Louisiana was then considering remedial emergency legislation, which would become law "on Monday" (3 days hence) and which would directly prohibit any Louisiana-incorporated bank holding company (such as Whitney Holding Corporation) and its subsidiaries from opening for business any bank not yet open (J.A. 264). Counsel urged the Court not to enjoin the Comptroller so that Whitney Holding could open its Jefferson offices before that law became effective (J.A. 264, 265). The Court replied that it was "not going to rush the matter in order to prevent an action on the part of the Louisiana or any other state legislature" (J.A. 264). The Court thereupon granted the preliminary injunction to preserve the status quo (J.A. 272, 273).

As indicated, since late May 1962, the State of Louisiana, never before confronted with the monopolistic plague of bank holding company operations but now confronted with a sudden, totally unexpected, arbitrary Federal administrative approval of what was considered a brazen attempt by the largest bank in the State to circumvent and evade the prohibitions of Fed-

eral and State branching statutes merely through the device of a holding company intermediary, had been considering, in its House and Senate, emergency legislation authorized to the States by the reservation contained in the Federal Bank Holding Company Act, 12 U.S.C. § 1846. This legislation, Act 275 of 1962, was passed by the House on June 27, 1962 by a vote of 80 to 16 (J.A. 333, 334). It passed in the Senate on July 4, 1962, and was signed into law on July 10, 1962, *the same day on which the Preliminary Injunction herein was signed by the District Court* (J.A. 295, 296, 221). This Act, at Section 3(5) and as here pertinent, provided:

“It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business . . .”

As stated above, all parties thereupon moved for summary judgment. It was stipulated and agreed that “the issue of the alleged violation of Louisiana Act 275 of 1962 is to be treated in all respects as raised in the pleadings herein” (J.A. 384, 385). In other words, the parties agreed in writing that the Court should determine whether Act 275 of 1962 effectively precluded the lawful issuance of a Certificate to Whitney-Jefferson, in addition to the question of whether the lawful issuance of a Certificate was likewise precluded by the original Section 36(e) issues raised by the pleadings.

Petitioners thereupon attacked Act 275 of 1962 as unconstitutional. The Louisiana State Bank Commissioner then moved to intervene (J.A. 346, 347). All parties consented to his intervention (J.A. 385). The District Court thus granted his motion and added him as a plaintiff (J.A. 385, 386).

After extensive briefing and oral argument of the motions for summary judgment, the District Court (Judge McLaughlin) granted respondents' cross-motions (J.A. 435-438). The Court ruled, in substance, that (a) the Comptroller of the Currency had no discretion to issue a Certificate under 12 U.S.C. §27, licensing an operation prohibited by law; (b) Act 275 of 1962 was constitutional and authorized to Louisiana by 12 U.S.C. § 1846; and (c) Act 275 rendered unlawful Whitney's proposed operations in Jefferson Parish, and thus the Comptroller was to be permanently enjoined from chartering same under 12 U.S.C. § 27. Judge McLaughlin went on to state (J.A. 438):

"The Court having upheld the constitutionality of Louisiana Act 275 in its application to defendant making it unlawful for said defendant to open in Louisiana, the Court deems it unnecessary to address itself to the cogent arguments put forth by counsel on the question of the applicability of 12 U.S.C. 36(e) as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank herein involved and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of the new bank to determine whether or not it is in violation of Section 36(e)." ¹²

¹² The District Court nevertheless made detailed *Findings of Fact* in support of its Judgment, and these clearly included all of the essential undisputed facts necessary to support a ruling on the Section 36(e) issues (J.A. 445-448). The Court's attention is directed particularly to Findings 7, 8 and 17 (J.A. 446, 448). These clearly establish the fallaciousness of the positions taken by petitioner Whitney under the second question raised in its petition (at pages 2, 3), and its allegation that the Court of Appeals disposed of the case "on the basis of a view of the facts which was never litigated in the District Court, which derives no support from the findings of that court, and . . . as to which no evidence was introduced" (See Whitney petition, pg. 11).

Petitioners both appealed (J.A. 452, 453). The Court of Appeals, consisting of Circuit Judges Miller, Washington and Danaher, affirmed the judgment of the District Court, holding, in substance, at 323 F. 2d 290:

"Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36 (c). It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory"

"We think it clear that the opening of Whitney-Jefferson is prohibited by 12 U.S.C. § 36 and that consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business"

Both the Comptroller and Whitney petitioned for rehearing *en banc*. These petitions were unanimously denied on October 17, 1963.¹³ The instant petitions for a writ of certiorari ensued.

SUMMARY OF ARGUMENT

I. It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537, cert. denied 358 U.S. 838; *Camden Trust Company v. Gidney*, 301 F. 2d 521, cert. denied 369 U.S. 886; *Commercial State Bank v. Gidney*, 474 F. Supp. 770, aff'd.

¹³ Two Judges abstained.

278 F. 2d 871). The National Bank Act itself (12 U.S.C. 27) proscribes the licensing of any proposed banking operation until it is found to be "*lawfully entitled to commence . . . business,*" and the Certificate may be withheld whenever the proposed operation is found to have been organized "*for any other than the legitimate objects contemplated*" by the National Bank *Act.*

In the case at bar, both petitioners concede that Whitney-New Orleans was *absolutely prohibited* by the National Bank Act (12 U.S.C. 36e, f) from opening any offices in Jefferson Parish, Louisiana; and that *solely* for the purpose of evading and defeating those statutory prohibitions, Whitney New Orleans organized its own holding company, which, in turn, then proposed to open, with \$650,000 drawn out of the funds of Whitney New Orleans, Whitney offices in the prohibited location. The Court of Appeal's obviously correctly enjoined the Comptroller of the Currency from licensing the opening of these proposed illegal operations under the language of 12 U.S.C. 27 itself, and under the long standing rule, established by this Court and others in the Federal system, that corporate forms and devices, including holding company intermediaries, shall be disregarded whenever same are set up or used for the purpose of evading or defeating a statutory prohibition (*Northern Securities Company v. United States*, 193 U.S. 197; *Metropolitan Holding Co. v. Snyder*, 79 F. 2d 263, and other cases cited in Point I of this brief).

This case accordingly presents *no* new, substantial federal question. It has, in fact, been settled since the early 1930's that whenever officers or shareholders of a national bank create a holding company specifically

for the purpose of evading or defeating a provision of the National Bank Act, the holding company must be ignored in order to sustain the Act (*Metropolitan Holding Co. v. Snyder, supra; Corker v. Soper*, 53 F. 2d 190, cert. denied, 285 U.S. 540 (1932)). Nor does this case present any conflict between circuits. The last-cited decisions of the Fifth and Eighth Circuits are wholly in accord with the ruling of the District of Columbia Circuit herein; and the same fundamental rule found in *First National Bank of Billings v. First Bank Stock Corporation*, 306 F. 2d 937, 942 (C.C.A. 9, 1963) was actually adopted and followed by the Court of Appeals in the instant case, where the Court stated:

"We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is "doing business through the instrumentality of" the other or "in the same way as if the institutions were one." "The unitary type of operation", said in the Billings opinion to be "characteristic of branch banking" is present here."

II. The licensing of Whitney's proposed offices in Jefferson Parish was correctly enjoined, not only because such offices were conceived and proposed as part of a clear-cut attempt to evade and defeat the prohibitions of the National Bank Act, *but also* because the opening of same is *directly prohibited* by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of the 1962 Legislature, La. R.S. 6: 1001-1006), adopted by Louisiana pursuant to the express '*Reservation of States' Rights*' contained in the Federal Bank Holding Company Act (12 U.S.C. 1846). Petitioners' contention that the Louisiana Act cannot prohibit the opening of a national bank subsidiary of a holding company was rejected by this Court's dismissal of the

appeal for want of a substantial federal question in *Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, appeal dismissed, 359 U.S. 311 (1959); and that contention was also disposed of by the definitions of "bank" and "subsidiary" contained in the Federal Bank Holding Company Act itself (12 U.S.C. 1841). These definitions of terms, later employed by Congress in 12 U.S.C. 1846, show that Congress intended to reserve to the States the right to regulate and prohibit both national and state bank subsidiaries of holding companies through State holding company legislation. This same conclusion flows directly from the Congressional history supporting the Federal Act, all as set forth in Point II of this brief.

III. For all the reasons set forth in Point III of this brief, there is no merit whatsoever to the contention that this case was not ripe for summary judgment. All parties moved for such relief, and counsel certified to the District Court, as a *condition precedent* to oral argument of those motions, that the facts are undisputed and that the determination of this case should turn *exclusively* on questions of law. The District Court and the Court of Appeals both rendered their decisions on the basis of those motions and stipulations by all parties. Only petitioner Whitney presently seeks to reverse its position, and this "turn-about" was not even attempted until after the Court of Appeals rendered its decision herein. The law is settled that this Court will not consider or entertain such baseless and specious contentions advanced for the first time after decision of the Court of Appeals (*Atlas v. Eastern Airlines, Inc.*, 311 F. 2d 156, 162, cert. denied, 373 U.S. 904 (1963); *Bloeth v. New York*, 82 S. Ct. 661, 662 (1962)). And, irrespective of Whit-

ney's present contentions, this case still turns solely on the law, and the law directs that the Comptroller be enjoined from licensing the proposed unlawful operation.

IV. This action *does not* represent a collateral attack on a decision of the Federal Reserve Board, and respondents, confronted with a threatened *illegal licensing* of an *unlawful competition*, clearly had standing to sue.

ARGUMENT

I

The Court of Appeals Correctly Enjoined the Comptroller of the Currency From Licensing, Under 12 U.S.C. § 27, a Proposed Banking Operation Admittedly Conceived, Designed and Proposed Solely for the Purpose of Evading, Defeating and Violating the Prohibitions of the National Bank Act (12 U.S.C. § 36c).

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. § 27) to issue his Certificate to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537 (C.C.A. 6, 1958), *cert. denied* 358 U.S. 838; *Camden Trust Company v. Gidney*, 301 F. 2d 521, 522 (ftn. 4, 5, D.C. App. 1962), *cert. denied* 369 U.S. 886; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, aff'd. 278 F. 2d 871 (D.C. App. 1961)). 12 U.S.C. § 27 itself proscribes the issuance of a Certificate until it can be shown that the banking association involved "is *lawfully* entitled to commence . . . business"; and it expressly provides for the withholding of a Certificate whenever it appears that the shareholders of the proposed banking facilities "have formed same for any other than the legitimate objects contemplated" by the National Bank Act.

In the case at bar, both petitioners unequivocally concede that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. § 36(e)) and Louisiana law from opening *any* banking offices or facilities outside of Orleans Parish, Louisiana.¹⁴ They likewise concede that the exclusive purpose of the intricate holding company maneuvers and the proposed Jefferson Parish banking operation now before this Court was and is to defeat and evade those prohibitions of the National Bank Act.¹⁵ It is submitted that these concessions, on their face, establish beyond peradventure that the proposed Jefferson Parish operation was expressly created for "*other than the legitimate objects contemplated*" by the National Bank Act, and accordingly, the issuance of a Certificate, which would authorize it to open for business, was necessarily and properly enjoined by the Courts below under the language of 12 U.S.C. § 27 itself.

Furthermore, in cases of this nature, the Federal Courts, with this Court in the vanguard, have historically ruled that when corporate forms or devices, including a holding company, are used for the purpose of evading, circumventing or frustrating a statutory prohibition or to defeat public or legislative policy, such devices must be disregarded in order to preserve and uphold the law (*Northern Securities Company v. United States*, 193 U.S. 197; *United States v. Lehigh Valley R. Co.*, 220 U.S. 257; *United States v. Reading Company*, 253 U.S. 26).

¹⁴ In 12 U.S.C. § 36 (e) Congress provided a broad definition for the term "branch". It defined "branch" to include "any branch bank, branch office, branch agency, additional office, or any branch place of business".

¹⁵ Whitney petition, pgs. 4, 5; Comptroller's petition, pgs. 3, 4.

Schenley Distillers Corp. v. United States, 326 U.S. 432; *Metropolitan Holding Co. v. Snyder*, 79 F. 2d 263 (C.C.A. 8, 1935); *Corker v. Soper*, 53 F. 2d 190 (C.C.A. 5, 1931), cert. denied 285 U.S. 540 (1932); *Alabama Power Company v. Federal Power Commission*, 94 F. 2d 601, 618 (D.C. App.); *Francis O. Day, Inc. v. Shapiro*, 267 F. 2d 669 (D.C. App.); *Fitzpatrick v. Commonwealth Oil Co.*, 285 F. 2d 726, 730 (C.C.A. 5); *Corn Products Refining Company v. Benson*, 232 F. 2d 554, 565 (C.C.A. 2)). In *Fletcher Cyclopedia Corporations* (1963 Rev. Ed.), Vol. 1, Ch. 2, § 45, pp. 240, 241, the rule adopted in this case by the Court of Appeals, is stated as follows:

"Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter."

Thus, while petitioners deceptively seek to contend that this case presents a new, substantial federal question in the banking field upon which the Circuit Courts allegedly are in conflict, *the exact opposite is true*. In fact, since the early 1930's the Circuit Courts have consistently ruled, in cases involving the banking industry, that whenever officers, directors or shareholders of a national bank create a holding company or some other similar corporate device, specifically for the purpose of evading or defeating a provision of the National Bank Act, the holding company must be ignored in order to sustain the law (*Metropolitan Holding Co. v. Snyder*, *supra*; *Corker v. Soper*, *supra*, in which case certiorari was denied by this Court). In the Metro-

opolitan Holding Company case, the Eighth Circuit ruled in 1935, at 79 F. 2d 263, 266, 267:

" . . . the court's will not countenance the interposition of a mere corporate shadow to conceal who are the actual and beneficial owners of bank shares. To permit individuals to circumvent . . . this statute by simply organizing a corporation for the purpose of holding shares would set up a device against which the statute would ever afterwards be ineffective. . . ."

The decision in *First National Bank of Billings v. First Bank Stock Corporation*, 306 F. 2d 937 (C.C.A. 9, 1963), referred to in the petitions herein, is not contrary to the basic rule adopted by the other circuits and applied by the District of Columbia Circuit in the case at bar. Indeed, the Ninth Circuit specifically stated in its opinion in the *Billings* case, at page 942:

" . . . We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

In the instant action, no effort whatsoever has been made by petitioners to conceal the fact that both the Comptroller and Whitney knew and intended *from the very beginning* that the whole purpose of the synthetic holding company device and the proposed Jefferson Parish bank was to enable Whitney National Bank of New Orleans to *attempt to evade 12 U.S.C. 36e* and to attempt to open, *with its own funds and under its own management and control*, banking offices at a prohibited location. The President of Whitney-

New Orleans frankly admitted this before the Federal Reserve Board as follows (Comp Ex. 4. J.A. 74) :

"If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. But that is not possible. We see no signs if it coming by legislative action. . . .

"The thing that makes this (the holding company) interesting to us is the ability to approach the branch phase of it."

Petitioners' counsel, of course, have continuously sought to persuade the District Court, the Court of Appeals and now this Court that there are certain differences *in form* between an ordinary branch bank and the proposed Whitney-Jefferson operation. Under the applicable rule of law, however, the Courts are *not* interested *in form*; they are concerned with *realities*. And, before the injunction was granted against the Comptroller in this action, these were the honest '*realities*' of the Whitney proposal, as openly expressed through the words and actions of Whitney-New Orleans and in one instance, by the Comptroller of the Currency himself:

1. "The *basic purpose of the program* is to allow the Whitney organization in New Orleans *to commence a Holding Company operation* controlling a bank in East Jefferson Parish . . ."¹⁶

2. "Under the holding company approach, the relationship is completely owned by the stockholders of the holding company *who will be all the present stockholders of the Whitney National Bank . . .*"¹⁷

¹⁶ J.A. 30, written statement of Whitney-New Orleans to its own stockholders.

¹⁷ J.A. 32, 33, written statement of Whitney-New Orleans to its own stockholders.

3. ". . . common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company . . . is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community."¹⁸
4. "From the *depositors'* point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption."¹⁹
5. "They (the depositors) will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and small bank have identical ownership as well as management."²⁰
6. "From the *customer point of view*, there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank and its officers.*"²¹
7. "Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization."²²
8. The end result of the entire corporate maneuver in the eyes of Whitney, would be as follows:

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is

¹⁸ J.A. 32, written statement of Whitney-New Orleans to its own stockholders.

¹⁹ J.A. 32, same as notes 14-16. At J.A. 43, Comptroller Saxon, in a sworn statement openly concedes: ". . . the same group would be managing both banks . . .".

²⁰ J.A. 32, same as notes 14-16.

²¹ J.A. 33, same as notes 14-16.

²² J.A. 33, same as notes 14-16.

now except for the withdrawal of \$650,000. in capital funds which will be put into the Jefferson Parish unit as capital for it.”²³

9. The application for a Certificate of Authority for Whitney-Jefferson was filed with the Comptroller of the Currency, *not* by Whitney Holding, *but* directly by Whitney National Bank of New Orleans, with a covering letter on a Whitney-New Orleans letterhead. In this letter, Whitney-New Orleans stated:²⁴

“These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson *of the Whitney organization in holding company form.*”

10. Customers of Whitney-New Orleans, when requested by Whitney-New Orleans to support before the Federal agencies the proposed Jefferson Parish operation, openly and uniformly referred to it in writing as a “*branch*” of Whitney-New Orleans.²⁵
11. Even the proposed checks, drafts, and stationary for the Jefferson Parish operation were printed so to emphasize in large letters *only* the words “Whitney National Bank”.²⁶

Clearly, on the basis of this record, the Court of Appeals correctly enjoined the Comptroller of the Currency from licensing this unlawful operation, proposed and designed solely to evade and defeat the prohibitions of Section 36c of the National Bank Act.

²³ J.A. 68; Testimony of President of Whitney-New Orleans before Federal Reserve Board.

²⁴ J.A. 380, 381.

²⁵ J.A. 366-371.

²⁶ J.A. 125-128.

II

The Lower Courts Likewise Correctly Enjoined the Comptroller From Licensing Under 12 U.S.C. § 27 a Bank Operation Further Directly Prohibited by the Louisiana Bank Holding Company Act, Adopted By Louisiana Pursuant to Rights Expressly Reserved to the States by the Federal Bank Holding Company Act.

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of Section 36c of the National Bank Act, but also because it is *directly* and *expressly prohibited* by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.-R.S.6: 1001-6: 1006 (1962 Supp.)), which, as here pertinent, provides:

"It shall be unlawful (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business"

Prior to the instant Whitney proposal, there were no known or proposed bank holding company operations in Louisiana. Suddenly, in 1962, Whitney, the largest bank by far in the entire State, threatened to break the dike and release for the first time on the Louisiana banking community the monopolistic flood of holding company operations (J.A. 161-164). Emergency legislation to prevent this was promptly introduced and overwhelmingly passed by the Louisiana Legislature (J.A. 333, 334). On July 10, 1962, this legislation (Act 275 of 1962) was signed into law. As stated above, it prohibited any *Louisiana-incorporated bank holding company*, such as Whitney Holding, or any *subsidiary* thereof, such as petitioner Whitney-Jefferson, from thenceforth opening for business any bank not then already open.

The said Louisiana statute, concededly intended to be directly applicable to petitioner Whitney, was enacted pursuant to the provisions of Section 7 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. § 1846), which provides:

"Reservation of rights to States—The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." (Italics supplied).

In *Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed for want of a substantial federal question*, 359 U.S. 311, Illinois, like Louisiana, passed a very similar State Bank Holding Company Act in 1957, pursuant to the reservation of States' rights contained in 12 U.S.C. § 1846. Braeburn Securities Corporation brought suit in the Illinois courts, contending precisely as petitioners have done in the case at bar, that the Illinois statute was (a) unconstitutional and (b) void, insofar as it applied to national bank subsidiaries of bank holding companies. The Illinois Supreme Court upheld the statute as constitutional and as a proper State regulation of national bank subsidiaries of holding companies within the provisions of 12 U.S.C. § 1846. Braeburn appealed to this Court, contending in a supporting brief (Docket 718, October, 1958 Term), precisely as petitioners have been doing in the case at bar, that

"Ever since *McCulloch v. Maryland*, 4 Wheat. 316—jurisdiction over internal affairs of national banks was exclusively in the Federal Government, and any State law which undertook to limit or control such banks is void . . ."

The State Auditor of Illinois thereupon filed a motion to dismiss Braeburn's appeal. *He contended Illinois had the clear right under 12 U.S.C. 1846 to regulate or prohibit bank holding companies whether they attempted to operate through national or state bank subsidiaries.* This Court, in a *per curiam* opinion in 1959, granted the motion to dismiss on the ground that the case failed to present a substantial federal question.²⁷ Dismissal on that ground, of course, is an action even stronger than judicial affirmation (*Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 (1923)).

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are instrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless *subject to State laws and prohibitions whenever Congress so provides* (*Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 559 (1963)). For example, Congress long before 1956, specifically made State law "the measuring stick for the establishment of branches by national banks" and application of those State restrictions and prohibitions to national banks has been recognized and upheld by this Court and others in the federal system (*United States v. Philadelphia National Bank*, 374 U.S. 321, 328 (1963); *Wayne Oakland Bank v. Gidney*, *supra*; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1960)). In certain other instances, Congress has applied State law as the measure of allow-

²⁷ See also *Opinion of the Justices of New Hampshire*, 151 A. 2d 236, upholding the proposed New Hampshire Bank Holding Company Act against contentions very similar to those advanced in *Braeburn* and again in the case at bar.

able capitalization of new national banks (48 Stat. 185 (1933), 12 U.S.C. § 51 (1958)). In other instances, it has limited national banks to interest rates on loans prescribed for state banks, a most important area of bank operation (48 Stat. 191 (1933), as amended 12 U.S.C. § 85 (1958)). National banks may be granted trust powers *only* when "not in contravention of State or local law . . ." (76 Stat. 668 (1962), 12 U.S.C.A. § 92a(a) (1962 supp.)). No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the national banking association is located" (64 Stat. 456 (1950), 12 U.S.C. § 214c (1958)). Congress has also specifically reserved to the States broad areas of taxation of national banks (44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958)), and Congress has "expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts" (*Mercantile National Bank v. Langdeau, supra*, at page 560).

Moreover, in the Federal Bank Holding Company Act, Congress went to great detail to make it clear that the Reservation of States' Rights contained in Section 7 of the Act applied to *both* national and state bank subsidiaries of holding companies. In 12 U.S.C. 1841(e) it defined the word "*bank*", later employed in 12 U.S.C. 1846, to include "*any national banking association or any State bank . . .*" The word "*subsidiary*", also later employed in 12 U.S.C. 1846, was defined at 12 U.S.C. 1841(d), to include "*any company 25 per centum or more of whose voting shares . . . is owned or controlled by [a] bank holding company*". And, finally, the word "*company*" is even defined, at 12 U.S.C. § 1841(b), to mean "*any*

corporation'. The sum total of these definitions makes it crystal clear that Congress, in 12 U.S.C. 1846, fully intended to reserve to the States the right to regulate, control and prohibit, if desired, all bank holding company operations within their respective borders, and to prevent, if necessary, the opening, within State borders, of any subsidiary *bank*, state or national, owned or controlled by a bank holding company.

Any remaining doubt in this connection was absolutely dispelled when the Federal Bank Holding Company Act was before the Senate, in 1956, for consideration. The Senate report in support of the bill specifically authorized the States to be "*more severe*", "*more restrictive*" on holding companies and their state or national bank subsidiaries than either the Federal Act or regulation thereunder by the Federal authorities might be (See U.S. Code and Congressional News, 1956, pg. 2493). And, when the manager of the bill, Chairman Robertson of the Senate Banking and Currency Committee, rose to explain the provisions of the legislation on the Senate floor, he specifically adopted a prior position taken by Senator Maybank, and stated with regard to Section 7 of the Act (now 12 U.S.C. 1846) (Cong. Record, 84th Cong. 2d Sess., p. 6752):

"Now, to me, States' rights means the right of a State to choose its own course of action on a matter within its own jurisdiction, and not have the Federal Government make up its mind for it. This is the positive approach. A State should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders. Any Federal legislation which forces a State to change its policies

with respect to either branch banking or holding companies would be an unwarranted interference with States rights

"Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, as an example of the type of legislation the States may enact, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia Legislature." (Italics supplied).

The Georgia bill printed in the Congressional Record, at pages 6752, 6753, provided for State control of both state and national bank subsidiaries of holding companies.

Also, while the Federal Bank Holding Company Act was before the Senate, Senator Douglas of Illinois offered an amendment, now contained in 12 U.S.C. § 1842(d) and entitled "*Limitation by State Boundaries*", which prohibited approvals by the Federal authorities of any holding company acquisitions in any State by an "outside" or foreign bank holding company or ~~any~~ subsidiary thereof, unless the State's statutory laws specifically authorized such acquisitions. Thus, in the final analysis, the Act contains two separate provisions (12 U.S.C. 1842(d) and 1846) whereby Congress authorized the States, including Louisiana, to be as severe and as restrictive as conditions warranted in their further statutory regulation or prohibition of holding company operations and expansions within their respective borders; and Congress left the States free to enforce those prohibitions or regulations irrespective of whether a holding company sought to operate by opening or acquiring a state or national bank subsidiary.

Such was the conclusion which undoubtedly supported this Court's dismissal of the appeal in *Bruebarn*. And, this being the case, Louisiana was obviously empowered by the Federal Bank Holding Company Act to prevent and foreclose the initial onslaught of holding company activities in that State by prohibiting Whitney Holding Corporation and its proposed national bank subsidiary from opening for business a bank holding company operation in Jefferson Parish.

It is equally clear, on the authority of this Court's recent decision in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), that this, therefore, is a case wherein certiorari should most emphatically be denied. In the words of Mr. Justice Black, at page 731, 732:

"We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting We refuse to sit as a "superlegislature to weigh the wisdom of legislation", and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory". Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

In brief, the irrefutable answer to the so-called "basic substantive issue" raised by the petitions herein,²⁸ is that the proposed opening of Whitney-Jefferson

²⁸ See Whitney's petition, pg. 9; Comptroller's petition, pg. 11.

in Louisiana is prohibited by *two separate combinations of Federal and State law*, i.e., irrespective of whether such operation be treated (a) as a proposed "branch" of Whitney-New Orleans or (b) as a proposed "*holding company subsidiary*" of Whitney Holding Corporation, or both. The former is precluded by Section 36c of the National Bank Act and Louisiana's branching statutes. The latter is foreclosed by Section 7 of the Federal Bank Holding Company Act and Section 3(5) of the Louisiana Holding Company law. In either case, the Comptroller of the Currency was properly enjoined from licensing an illegal operation—and it is submitted that such rulings, correct on their face as a matter of law, require no review by this Court.

III

**All Parties Before This Court Moved for Summary Judgment
Herein and Both the District Court and the Court of Appeals,
Without Any Objection By Any Party, Rendered
Their Decisions on the Basis of an Express Stipulation By
Counsel That This Case, Involving Undisputed Facts and
Questions of Law Only, Was Ripe for Summary Judgment.**

The Comptroller of the Currency was the first party to move for summary judgment in this action. Cross-motions for the same relief were promptly filed by respondents and petitioner Whitney. All parties agreed in their motion papers that "there is no genuine issue herein as to any material fact". When these motions came on before the District Court, Judge McLaughlin stated at the very outset (J.A. 431):

"The Court will ask counsel on both sides to respond to the question of the Court as to whether there is any substantial question of fact involved in this case, or whether it is *fully agreed* by all

that the question to be presented to the Court is strictly a question of law.

"We all know if there is any substantial question of fact that is a bar to the Court proceeding in a motion for summary judgment."

Petitioner Whitney, which now seeks to contend, *for the first time after decision of the Court of Appeals*, that this case is not ripe for summary judgment, therupon advised Judge McLaughlin on the record as follows (J.A. 431, 432):

"*Mr. Acheson: Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs, if by fact we mean an event, something which occurred and can be reported; if we mean a conclusion which is drawn from that, there are different conclusions. These I submit and we have submitted in papers filed with Your Honor are mere conclusions of law, or conclusions to be drawn from undisputed facts. There are no facts as such which are in dispute. This is my assertion to Your Honor . . . I know of no event, no specific occasion, nothing which was done upon which there is any difference between us.*

(Italics supplied).

The District Court thereupon agreed to hear and determine the motions for summary judgment, and the case was heard and decided by the Court of Appeals, *without objection*, on the same basis. And, of course, while petitioner Whitney presently seeks to contend, for the very first time *after decision of the Court of Appeals*, that summary judgment was improper here, it is interesting to note that the Comptroller of the Currency, in his instant petition, still cannot move himself to join Whitney in this totally implausible position.

As though it were not enough for Whitney so belatedly to exhibit these capacities as a chameleon, it goes further and seeks to support its instant baseless contention *solely* through the device of attacking the credibility of all of the past written statements and formal testimony of its own organizer, Mr. K. W. Berry, who is still the President of Whitney-New Orleans and who is a banker with 25 years or more experience as the head of the largest bank in Louisiana. Counsel for Whitney argues that he should be permitted now "to offer evidence to rebut" Mr. Berry's assertions that Whitney-New Orleans planned to operate Whitney-Jefferson "in the same way as if the institutions were one".²⁹ This surely must be the first time in the memory of this Court that any party sought certiorari on the ground that the Court of Appeals erred by accepting as true and by taking at face value the petitioner's *own* prior written statements and formal testimony, and that a trial was required in order to give that petitioner a chance to rebut its own prior evidence. In any event, as late as April, 1963, this Court denied certiorari in a case where a similar, although not as bizarre, contention was advanced (*Atlas v. Eastern Airlines, Inc.*, 311 F. 2d 156, 162 (C.C.A. 1, 1962), cert. denied, 373 U.S. 904 (1963)). In that case, the First Circuit stated, at page 162:

"Plaintiff also urges here that the district court erred in granting the motion for summary judgment because the record indicated that the credibility of the affiants . . . was in serious question . . . Be that as it may, counsel for plaintiff did not

²⁹ See Whitney petition, pg. 23.

seek to raise this question below, nor did he attempt to cross-examine the affiants in this regard . . . Consequently, he cannot be heard now.”³⁰

As demonstrated in Points I and II above, this case turns exclusively on questions of law. If Whitney-Jefferson is to be treated as a *branch* of Whitney-New Orleans, it is outlawed by Section 36c of the National Bank Act. If, on the other hand, Whitney-Jefferson is treated solely as a bank holding company subsidiary, it is outlawed by 12 U.S.C. 1846 and Louisiana Act 275 of 1962. There could never be a case more fully suited for summary judgment than this one. And, insofar as the effect of Whitney-New Orleans’ “*intent*” in this case is concerned, it was settled in *Metropolitan Holding Co. v. Snyder, supra*, at page 268, as follows:

“The incorporators of the holding company may have acted in good faith according to their standards of right, but under the facts of this case, as disclosed by the record, they must be judged by the *legal effect of what they deliberately did*. If . . . the corporation was merely an instrumentality set up for their own convenience in holding title to the shares, *then in equity it matters not what design, good or evil*, prompted their actions; from either source, the effects of their actions—the avoidance of statutory liability—are the same.”

³⁰ See also *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), where this Court stated: “It is not for us to invite review by this Court of decisions turning solely on an evaluation of testimony . . .”; *Bloeth v. New York*, 82 S. Ct. 661, 662 (1962), where this Court ruled: “It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the . . . motion for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them.”

IV

This Action Does Not Represent a Collateral Attack on a Decision of the Federal Reserve Board. Its Sole Purpose is to Enjoin the Comptroller of the Currency From Licensing An Unlawful Operation Under the National Bank Act, Which the Comptroller Alone Is Authorized to Administer.

The complaint in this action seeks no relief, directly, indirectly, or collaterally against the Federal Reserve Board. That Board is not even a party to this action, and it has never sought to intervene or to be represented at any of the proceedings herein, either in the District Court or before the Court of Appeals or in this Court. The injunctive relief granted by the District Court and affirmed by the Court of Appeals does *not* operate to stay or enjoin the Federal Reserve Board in any respect, and it does not operate to reverse, set aside or modify any order or opinion of that Board.

On the contrary, the sole purpose of this suit is to enjoin the Comptroller of the Currency from issuing a license *under the National Bank Act* (12 U.S.C. 27) authorizing an unlawful national banking operation to open for business. This, of course, is not the first time such actions have been brought and sustained by the courts against the Comptroller of the Currency, and in none of these prior cases has it been contended or held that a suit to enjoin the Comptroller constitutes a collateral attack on the Federal Reserve Board (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537 (C.C.A. 6, 1958), cert. denied 358 U.S. 830; *Commercial State Bank v. Gidney*; 174 F. Supp. 770, aff'd. 278 F. 2d 871 (D.C. App.)).

Petitioners themselves, in spite of their frantic preoccupation with the invention of baseless arguments

for inclusion in their instant petitions, nevertheless were compelled openly to state in those same petitions that the Comptroller of the Currency *alone, not* the Federal Reserve Board, is the *sole officer* charged by Congress with the licensing of national bank operations under the National Bank Act.³¹ They admit further in these same petitions that the Federal Reserve Board's sole function, insofar as the Whitney plan was concerned, was to consider the *wholly unrelated matter* of whether Whitney Holding Corporation, the proposed bank holding company, should be permitted to acquire the stock in Whitney-Jefferson under a *completely separate and different statute*, to wit, the Federal Bank Holding Company Act (12 U.S.C. 1842).³² In short, they concede that Congress has charged the Comptroller with administration of the National Bank Act and the Federal Reserve Board with administration of the Holding Company Act. The Comptroller accordingly has no jurisdiction over holding company acquisitions and the Board has nothing whatsoever to do with the chartering of national banks or branches of national banks under the National Bank Act.

Indeed, the Federal Reserve Board *itself* was exceedingly careful to make that fact crystal clear when dissenting minority stockholders of Whitney-New Orleans and respondents sought to convince the Board

³¹ The Comptroller's petition, at pg. 11, states: "The permission of the Comptroller of the Currency is necessary under the National Bank Act in order to open a new national bank. 12 U.S.C. 27." Whitney's petition, pg. 6, states: "The Comptroller of the Currency was authorized by law to pass on . . . the formation of a . . . bank in Jefferson Parish. (12 U.S.C. 26)."

³² See Whitney's petition, pg. 6; Comptroller's petition, pgs. 5, 11.

that it should *not* approve the *holding company acquisition phases* of the Whitney program because the entire plan was a mere device to circumvent and defeat Section 36c of the National Bank Act. *The Board refused even to consider the matter, ruling that those objections or charges "relate largely to an alleged violation of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department"* (J.A. 168).

In view of the foregoing, it seems unnecessary to deal extensively with petitioners' fallacious contentions that the District Court and the Court of Appeals were powerless to enjoin the Comptroller from licensing under the National Bank Act a patent violation of the law (a) because respondents allegedly did not exhaust their administrative remedies before the Federal Reserve Board *in a totally different proceeding and under a completely different statute, the Federal Bank Holding Company Act*, or (b) because respondents allegedly had no standing to sue. The short answer to the first argument, of course, is that respondents did exhaust what remedies they had before the Board, but the Board refused, for lack of jurisdiction, even to consider the contention that the Whitney plan was in violation of the National Bank Act (J.A. 168). Respondents thereupon sought judicial review of the Board's decision under 12 U.S.C. 1848. Those proceedings are still pending in the Fifth Circuit, and that Court, after argument and *on its own motion*, stayed further proceedings there until after the final decision in the case at bar. What more could respondents do? The Federal Reserve Board held no *formal statutory hearing* on the application of Whit-

ney Holding Corporation as contemplated by 12 U.S.C. 1842(b), and they have pursued all other remedies afforded by the Holding Company Act.

But irrespective of this, it seems proper to ask simply: Just what does petitioners' contention have to do with the case before this Court? The alleged failure of respondents to exhaust administrative remedies before the Federal Reserve Board in an administrative proceeding under the Federal Bank Holding Company Act is a defense which belongs, *not to petitioners before this Court, but to the Federal Reserve Board alone.*³³ *And of course, there were concededly no administrative remedies to exhaust before the Comptroller of the Currency.*³⁴ He grants or denies certificates under the National Bank Act without holding hearings and without any procedures such as those prescribed by the Administrative Procedure Act, and he is thus wholly precluded from asserting any "failure to exhaust" defense of his own in this action. He is likewise powerless to interpose here a defense which allegedly belongs to some other Federal agency in some other pending law suit. This conclusion is particularly compelling, where the defense sought to be asserted by

³³ The Federal Reserve Board has indeed raised that very defense in the case pending in the Fifth Circuit, where it will be directly ruled upon. *Thus, instead of respondents collaterally attacking the Federal Reserve Board in this action, the exact opposite is true.* Petitioners are seeking to have this Court pass on issues pending for decision, after argument, in the Fifth Circuit in a case involving other parties and other federal statutes.

³⁴ See Comptroller's petition, pg. 11, which states: "The latter statute (the National Bank Act) *does not provide for an administrative hearing . . . and the Comptroller's decisions are made informally, without an administrative record.*"

the Comptroller would have no merit even if it were asserted by the proper agency.³⁵

This brings us to the Comptroller's specious contention that respondent banks lack standing to sue in the case at bar. That argument was effectively disposed of in *Wayne Oakland Bank v. Gidney*, 252 F. 2d 537, 544 (C.C.A. 6), cert. denied 358 U.S. 830, wherein the Sixth Circuit ruled:

"... The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by *unlawful action* of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

Very similar rulings were made in *Wisconsin Bankers Association v. Robertson*, 190 F. Supp. 90, Aff'd. 294 F. 2d 714 (D.C. App.), cert. denied 368 U.S. 938, rehearing denied 368 U.S. 979, and in *Commercial State Bank v. Gidney*; *supra*.

Consequently, the Court of Appeals was surely correct when it found in the case at bar that respondents

³⁵ It should be fully understood that respondents have not sought to bypass the Congressionally prescribed procedures under the Holding Company Act. On the contrary, respondents have vigorously pursued those procedures under 12 U.S.C. 1848 in the Fifth Circuit. *But, in the meantime, the Comptroller of the Currency knowingly and purposefully sought to frustrate those procedures by licensing and putting the unlawful operation into business under the National Bank Act before the said procedures could even be commenced in the Fifth Circuit* (J.A. 34, 47, 289). And, of course, once the Comptroller issued the certificate, respondents would have no effective remedy against him for revocation of same (*Commercial State Bank v. Gidney*, 174 F. Supp. 770, 778, 779, aff'd. 278 F. 2d 871 (1960)). Hence, the vital necessity of this suit and the injunctive relief granted against the Comptroller.

had standing to protect themselfes and their properties against attempted *unlawful competition* and to enjoin the *illegal licensing* by the Comptroller of such operations. In the words of the Court of Appeals:

"But where, as here, the threatened competition arises from an alleged illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."³⁶

CONCLUSION

The petitions for writ of certiorari herein should be denied.

Respectfully submitted,

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³⁶ *Saxon, et al. v. Bank of New Orleans & Trust Co. et al.*, 323 F. 2d 290, 29 (1963).